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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIO JESUS ROMERO, Defendant and Appellant.	F074490 (Super. Ct. No. BF150357A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Julio Jesus Romero shot a firearm into a crowd of partygoers after a fight erupted outside of a house party. Multiple people were shot: two victims died from their wounds, one was paralyzed from the waist down, and another sustained multiple injuries. In connection with the shooting, a jury convicted defendant of two counts of premeditated murder (Pen. Code, § 187, subd. (a)[1] (counts 1 & 2)) enhanced by allegations the murders were willful, deliberate and premeditated (§ 189), personal discharge of a firearm (§ 12022.53, subd. (d)), and a multiple murder special circumstance (§ 190.2, subd. (a)(3); two counts of attempted premeditated murder (§§ 664/187, subd. (a) (counts 3 & 5)) enhanced by a personal discharge of a firearm allegation (§ 12022.53, subd. (d)), and an allegation the attempted murders were willful, deliberate and premeditated (§ 189); and two counts of assault with a semiautomatic firearm (§ 245, subd. (b) (counts 4 & 6)) enhanced by allegations of personal use of a firearm (§ 12022.5, subd. (a)) and great bodily injury (§ 12022.7).

On appeal, defendant contends: (1) insufficient evidence supports the jury's findings the murders and attempted murders were willful, deliberate and premeditated; (2) the trial court prejudicially erred by instructing the jury with the "Right to Self-Defense: Mutual Combat or Initial Aggressor" instruction provided for in CALCRIM No. 3471 and (3) the "Right to Self-Defense: May Not Be Contrived" instruction provided for in CALCRIM No. 3472; (4) if his challenges to CALCRIM Nos. 3471 and 3472 are deemed waived, his counsel rendered ineffective assistance of counsel; (5) the cumulative effect of these errors resulted in a violation of defendant's right to due process; and (6) the matter should be remanded for a new sentencing hearing to permit the court to exercise its discretion and decide whether to strike the firearm enhancements in light of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620).

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1 Unless otherwise stated, all further statutory references are to the Penal Code.

We remand to permit the trial court to exercise its discretion under section 12022.53, subdivision (h), as amended by Senate Bill No. 620. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

In May 2013, Sergio B. hosted a party at his house that began around 10:00 or 11:00 p.m. He charged a $2 cover charge. By around midnight, there were "a lot of people." Sergio did not know most of the attendees, but his best friends Jose G. and Roman G. were present as well as his other friends Feliberto P. and David G. At some point, Sergio escorted someone who had not paid the $2 cover charge out the front door. Sergio showed him the pistol he had in his waistband and the person "made his way outside without an altercation," but "he started exchanging words with one of the individuals that w[as] behind [Sergio]." The next thing Sergio knew, the guy "was knocked out[, t]wo girls picked him up, [and] started dragging him off."

As Sergio started making his way back inside, "another fight broke out" on the sidewalk in front of Sergio's neighbor's house. Sergio started running towards the fight when "shots were fired" from the middle of the street. Sergio heard six or seven shots. He then saw "an individual holding a pistol" fire a last shot into the air. Sergio pulled out a pistol and cocked it back, but it jammed so he went inside his house to unjam it. Sergio started throwing everyone out while he unjammed his gun. Sergio explained he was carrying a pistol because the parties he "had been going to before had been going crazy, and people had been shooting and just ridiculous stuff" so he wanted to "stay protected and make sure that nobody else came in with a weapon."

By the time Sergio went back outside, the suspect was gone and he realized people had been hurt. He saw Roman G.'s little sister Jasmine holding Roman, who was "pale," "blank face[d]," and "couldn't move." He also saw Reginald B. lying on the ground. Sergio met with detectives and noticed the shooter in the last lineup he was shown, but he did not identify him because he wanted to handle the situation himself. At some point,

Sergio identified defendant in a lineup and, at trial, Sergio identified defendant as the individual he saw holding the gun, noting defendant had "an unforgettable face." According to Sergio, he was about 18 to 20 feet away from defendant, with a clear view, when he saw him in the street with a gun. Defendant was under a streetlight and was wearing a white shirt. According to Sergio, he had never met defendant before that night.

Deliah C. testified she was in Sergio's kitchen when she heard there was an altercation happening in front of the house. She walked outside and saw six to eight people fighting, including the four victims. She then saw someone wearing a white T-shirt and khaki shorts who was engaged in the fight back away, remove a gun from his waistband, and fire at the victims before fleeing in a car. She did not see anyone else pull a weapon during the fight. She reported to Detective R. Kroeker, the lead investigator, that it appeared the shooter was being "selective" and shooting at the people who were fighting his friends.

Eva M. testified she witnessed two fights in front of the house party. At some point, the second fight was breaking up and people were leaving "when warning shots went off [into the air] and … everyone scattered." One of the victims, Feliberto P., was running toward Eva when the shooter shot him in the back. Eva saw the shooter jog towards the right side of the house in a carefree manner where he was picked up in a truck. According to Eva, the shooter was wearing brown shorts and a white T-shirt. He was Hispanic, between 5 feet 8 and 5 feet 11 inches tall, and weighed approximately 140 to 150 pounds.

Santiago U. also testified to seeing two fights occur in front of Sergio's house. The second fight occurred on the curb, closer to the street. One of the groups that was fighting included Santiago's friends, and the other group involved people that were with defendant; but Santiago could not recall if defendant was actually involved in the second fight. He saw one of the people involved in the second fight "leaving the scene … [b]ut he … came back and fired two shots in the air." Santiago saw Jose G. and Feliberto P.

running toward him when they were shot. Santiago saw the shooter shoot them from approximately 15 feet away. The shooter was wearing a white T-shirt, tan shorts, and black shoes. The shooter then jogged away and passed approximately four feet away from Santiago. Santiago identified defendant as the shooter at trial and testified he saw defendant with a gun.

Adam L. testified he was the DJ at Sergio's party. He recalled watching someone he referred to as Anthony getting escorted out the front door. Adam went outside and saw people talking and "cussing at each other." Adam then saw David G. punch Anthony in the face "and pretty much knock[] him out." Anthony fell to the ground, somebody helped him up, and then "somebody else came up"—not defendant—and "said something to piss everybody off." "David socked him, and that's when everything just escalated right there," and "everybody started attacking him." "They started … jumping him, and … made their way from the front door all the way down to the car." "He was pretty much leaned up against the car, standing there. And before you knew it, all you hear is … gunshots."

Adam heard approximately six gunshots. Adam told Detective Kroeker he saw a person with a gun 20 feet away from him jogging away from the scene in a white T-shirt and cargo shorts. The suspect was shooting from about 15 feet away. Adam saw Feliberto P. and Roman G. lying on the ground because they had been shot. Adam identified defendant in a photographic lineup and in court as the shooter. On cross-examination, Adam denied seeing the shooting in this case, but stated he heard the gunshots. He testified he did not see the suspect with a gun; rather, he saw him jogging away in a manner he found suspicious.

Anthony C. testified he went to Sergio's party and met someone he referred to as "Pothead." Anthony saw Pothead talking to different people, including defendant. At some point, Anthony witnessed an argument in the backyard between Pothead and a stocky male, who was approximately 5 feet 7 inches tall. Anthony tried to calm them

down and saw them shake hands, but he could feel remaining tension. Defendant also tried to calm Pothead down. About 40 minutes later, Anthony was smoking a cigarette in the backyard when he heard gunshots in the front of the house. He stayed in the backyard until Sergio told everyone to leave. Anthony denied that he was the person who did not pay the entry fee or was punched in the front yard.

Defendant testified on his own behalf and admitted he was the shooter. He testified he heard about Sergio's party through a mass group text message. He decided to go to the party but did not expect to know anyone there. He brought a gun with him "[b]ecause there ha[d] been parties before where there had been shootings" and he did not "know what to expect." When he arrived, defendant met Anthony and someone he referred to as "Pothead," who defendant was friendly with and had known for approximately a year or two. At some point, defendant and Anthony walked into the backyard towards Pothead and noticed tension between Pothead and a group; "[t]hey were staring at each other" and Pothead seemed angry. Based on his relationship with Pothead, defendant tried to calm him down and told him not to start a fight. Pothead calmed down and defendant, Pothead, Anthony, and someone named Armando stayed in the backyard for a few minutes talking. According to defendant, someone was asked to leave because he had not paid. The individual was escorted out and everyone, including defendant, followed. When he went into the front yard, defendant saw a group "basically on top of this one guy that they escorted out" and eventually "somebody socked him and he fell." Defendant denied that the person escorted out and punched was Anthony.

Defendant walked into the middle of the group of approximately 25 people to see what was going on. He denied there was anyone in the fight that he was trying to help or protect. Defendant testified, as he got closer, he "got punched" and then he punched the person back. Then, "the whole mob just attacked [him]," and started beating him up. According to defendant, he was "scared for [his] life"; they were hitting him everywhere, including his head and face. He leaned against a car so he would not fall and "because

everyone was surrounding [him]." Defendant testified he "looked to the middle of the grass and somebody was racking a gun," "getting ready to fire." "At that time … [defendant] pulled [his] gun out and … just started shooting everywhere, all directions." Defendant testified he was in fear for his life, nauseous, and blacking out, and he did not know where he shot. He denied intending to kill; rather, he testified, he intended to save himself. "After several gunshots, everyone ran and [defendant] stumbled to [his] car." Defendant then went to a friend's house and drank. When defendant went home the next morning, an acquaintance notified him people were looking for him and wanted to kill him because they knew he was involved in the shooting. Defendant decided to run away to Mexico.

Two years after the shooting, Deputy United States Marshal Frankie Sanchez coordinated with Mexican law enforcement agencies to locate defendant and return him to the United States. In June 2015, Detective Kroeker took custody of defendant when he arrived at Los Angeles International Airport.

As a result of the shooting, Feliberto P. and Jose G. died from their wounds. Reginald B., who was shot three times, twice in the back and once on his side, was in the hospital for 11 days. He had surgeries on his lungs, diaphragm, and back, and had his spleen and part of his pancreas removed. Roman G. was shot once in his right armpit; the bullet went through his lung and hit his spine, leaving him paralyzed from the waist down.

The jury convicted defendant of two counts of premeditated murder (counts 1 & 2) enhanced by allegations of personal discharge of a firearm and a multiple murder special circumstance; two counts of attempted, premeditated murder (counts 3 & 5) enhanced by a personal discharge of a firearm allegation; and two counts of assault with a semiautomatic firearm (counts 4 & 6) enhanced by personal use of a firearm and great bodily injury allegations.

DISCUSSION

I. Sufficiency of Evidence of First Degree Murder

Defendant contends there was insufficient evidence to support the jury's conclusions the murders and attempted murders were willful, deliberate, and premeditated.

A. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*); *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a reasonable doubt. (*Ibid*.) If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Ibid*.)

We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis … is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid*.)

B. Applicable Law—Deliberation and Premeditation

"First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty." *(People v. Chiu* (2014) 59 Ca1.4th 155, 166.) "That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Ibid.*)

The issue on appeal concerns the jury's finding of premeditation and deliberation. "'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.'" *(People v. Pearson* (2013) 56 Ca1.4th 393, 443.) Premeditation "encompasses the idea that a defendant thought about or considered the act beforehand." (*Ibid.*) Deliberation "'"refers to careful weighing of considerations in forming a course of action …."'" (*Ibid.*)

In *People v. Anderson* (1968) 70 Ca1.2d 15, the California Supreme Court surveyed prior cases and developed guidelines to aid reviewing courts in assessing the sufficiency of the evidence to sustain findings of premeditation and deliberation. (*Id.* at pp. 26–34; *People v. Young* (2005) 34 Ca1.4th 1149, 1182–1183.) The court identified three categories of evidence pertinent to this analysis: planning, motive, and manner of killing. (*Bolin*, *supra,* 18 Ca1.4th at pp. 331–332, citing *Anderson*, *supra,* at pp. 26–27.) Notably, the *Anderson* guidelines are "'descriptive, not normative,' and reflect the court's attempt 'to do no more than catalog common factors that had occurred in prior cases.'" (*People v. Young*, *supra*, at p. 1183.) *Anderson* does not require these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *(Bolin*, *supra*, at p. 331.) *Anderson* was intended to guide an appellate court's assessment whether the evidence supports an inference the killing occurred as the

result of preexisting reflection rather than unconsidered or rash impulse. (*Bolin*, *supra*, at pp. 331–332; *People v. Pride* (1992) 3 Ca1.4th 195, 247.)

C. Analysis

Defendant first contends the record does not contain substantial evidence that he committed the murders and attempted murders with premeditation and deliberation. He argues "[t]he prosecution presented no evidence of a plan … to kill," "[a]ny [evidence of] motive … was weak at best," and though "the method of killing-shots might support a specific intent to kill (second degree murder and attempted murder), the hasty manner in which the shooting occurred shows unconsidered, impulsive conduct, which is woefully insufficient to support the requisite finding of willful, deliberate, and premeditated first degree murder and aggravated attempted murder." The People respond substantial evidence supported the jury's findings the murders and attempted murders were willful, deliberate and premeditated—there was evidence defendant brought a firearm tucked in his waistband to the party, "[h]e disengaged from the fight, ran down the street, and returned before firing his shots," the "four victims were not random bystanders but were instead aligned with the homeowner's group," and "he shot the victims at close range after the fight had already dissipated and the victims were fleeing, and he then entered a waiting vehicle." We agree with the People.

"'The process of premeditation and deliberation does not require any extended period of time.'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "'"The true test is not the duration of time [but] the extent of the reflection."'" (*Ibid.*) "'"Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly…." [Citations.]'" (*Ibid.*) The fundamental inquiry is whether a rational jury could have concluded the crime occurred as the result of preexisting reflection rather than a rash or unconsidered impulse. (*People v. Sanchez* (1995) 12 Cal.4th 1, 33, disapproved of on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Felix* (2009) 172 Cal.App.4th 1618, 1626.)

For the reasons that follow, we conclude sufficient evidence supports the jury's conclusions the murders and attempted murders were deliberate and premeditated.

1. Planning activity

Here, there was evidence of planning activity. Defendant brought a loaded handgun to the party concealed in his waistband. (See, e.g., *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1081–1082 [the defendant's act of arming himself with concealed and loaded guns was evidence of planning consistent with finding of premeditation and deliberation]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208 [gang members arming themselves before party and parking around corner relevant to planning]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1222, 1224 [fact the defendant was armed with loaded gun was planning activity, which was relevant to premeditation and deliberation, even though he did not expect to encounter victim on day of shooting]; see also *People v. Lee* (2011) 51 Cal.4th 620, 636 [jury could infer the defendant had considered possibility of violent encounter because he brought a loaded handgun with him on night of murder]; *People v. Elliot* (2007) 37 Cal.4th 453, 471 ["That [the] defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter'"].) Defendant attempts to factually distinguish cases in which the court considered a defendant's act of arming himself as evidence of planning. (See, e.g., *People v. Koontz*, *supra*, at pp. 1081–1082; *People v. Ramos*, *supra*, at p. 1208; *People v. Lee* , *supra*, at p. 636; *People v. Elliot*, *supra*, at p. 471.) He argues other evidence in those cases, aside from the defendants' advanced possession of a weapon, supported the juries' findings the murders or attempted murders were planned and, thus, premeditated and deliberated. However, while the case-specific facts of these cases vary, it is undisputed these courts considered the defendants' acts of arming themselves as evidence of planning. Defendant even concedes "carrying a loaded firearm may at times be some evidence of 'preparation.'" Here, in addition to defendant arming himself to attend the party, there is also evidence defendant moved away from the fight into the street, pulled the gun from his waistband

and began shooting, and then jumped into a waiting car in which he escaped, further evidencing planning. (See *People v. Morris* (1988) 46 Cal.3d 1, 23 [the defendant's possession of weapon in advance of shooting and his rapid escape in waiting car afterwards support inference of planning activity], disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

2. Motive

With regard to motive, defendant contends "[t]here was no evidence [he] knew or had previously dealt with any of the individuals who were shot." He contends the prosecution's theory of the case—that the shooting was in retaliation for his friends being ejected from the party and the subsequent fight that ensued with Sergio and his friends—was unsupported. Rather, he argues the evidence of his anger established a motive to kill based on "'unconsidered or rash impulse hastily executed.'"

First, the prosecutor was not required to prove a specific motive. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 421["[The Supreme Court has] '"never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder." [Citation.]'"]; see also *People v. Thomas* (1992) 2 Cal.4th 489, 519 [same]; *People v. Larrios* (1934) 220 Cal. 236, 251; CALJIC No. 2.51; CALCRIM No. 370.) Irrespective, viewing the evidence in the light most favorable to the jury's verdict as we must, here, there was evidence from which the jury could conclude tension was mounting between Sergio and his friends and a group with whom defendant was associating. Indeed, defendant admits he was friendly with the individual he referred to as Pothead, and had known him for approximately a year. According to defendant's own testimony, Pothead had an argument with someone in the backyard who, based on the testimony of others, was a friend of Sergio's, and there was lingering tension. Additionally, Santiago U. testified defendant's friends were involved in the fight that broke out in front of the house.

Thus, there was evidence defendant had a motive to retaliate against Sergio's group of friends. The evidence also established that three of the four individuals shot, Jose G., Feliberto P., and Roman G., were Sergio's friends. Deliah, in fact, reported to Detective Kroeker that it appeared the shooter was being "selective" and shooting at the people who were fighting his friends. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 [sufficient evidence of premeditation and deliberation where the defendants "targeted" victims and had "prospect of retaliation in mind"].) And at least two of the victims, Feliberto P. and Reginald B., were shot multiple times. To the extent the record could support conflicting inferences, we defer to the jury's findings regarding the credibility of the witnesses and the truth or falsity of the facts upon which its verdict depended. (See *People v. Zamudio*, *supra*, 43 Cal.4th at p. 357 ["'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict."].)

3. Manner of killing

Furthermore, the manner of killing—multiple bullets fired from close range at specific, unsuspecting victims attempting to escape—suggests a malicious, "calculated design to ensure death rather than an unconsidered explosion of violence." (*People v. Horning* (2004) 34 Cal.4th 871, 902–903.) Here, Deliah testified she saw someone with a white T-shirt and khaki shorts—clothes defendant was identified as wearing on the night of the shooting—engage in the fight in the front yard, back away, remove a gun from his waistband, and fire selectively at the victims before fleeing in a car. Thus, the jury could have concluded defendant had time to reflect on his actions such that the murders and

attempted murders were premeditated. Additionally, there was evidence defendant fired multiple shots at the group of fleeing partygoers from close range (15 feet or less away), and there was no evidence any of the victims were armed. (See *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295 [close-range shooting without evidence of struggle supported inference of premeditation and deliberation]; *People v. Thompson* (2010) 49 Cal.4th 79, 114–115 [sufficient evidence of premeditation and deliberation where the defendant shot victim from "just a few feet" away without evidence of struggle]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 ["The manner of killing, while not an execution-style single shot to the head, could still support a finding of premeditation and deliberation, as defendant quickly fired three shots at the victim, with a shotgun, from a relatively close range"]; *People v. Villegas*, *supra*, 92 Cal.App.4th at p. 1224 [manner of shooting—at least six shots, fired from about 25 feet away and "directed at the occupants of the truck"—supported finding of premeditation]; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 [multiple shots fired at close range into group of people in rival gang territory supported inference perpetrator, with premeditation and deliberation, intended to inflict death].)

Viewing such evidence in the light most favorable to the verdict, as we must, we conclude substantial evidence supports the jury's conclusion the murders and attempted murders were deliberate and premeditated. (See *People v. Cook* (1940) 15 Cal.2d 507, 516 [A jury may determine whether premeditation exists "from a consideration of the type of weapon employed and the manner of its use; the nature of the wounds suffered by the [victim]; the fact that the attack was unprovoked and that the [victim] was unarmed at the time of the assault; the conduct of [the] assailant in … neglecting to aid [the victim] …, and [the assailant's] immediate flight thereafter from the scene of the assault."].) That the circumstances might also reasonably have supported contrary findings is not cause for reversal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263; *People v. Lewis* (2001) 25 Cal.4th 610, 643–644.)

We reject defendant's first contention.

II. CALCRIM No. 3471

Defendant next argues the trial court committed reversible error by including an initial aggressor or mutual combat jury instruction as provided for in CALCRIM No. 3471.

A. Relevant Factual Background

The trial court instructed the jury with CALCRIM No. 3471 as follows:

> "A person who engages in mutual combat or who starts a fight has a right to self defense only if, one, he actually in good faith tried to stop fighting. Two, he indicated by word or by conduct to his opponent in a way that a reasonable person would understand that he wanted to stop fighting and that he had stopped fighting. And, three, he gave his opponent a chance to stop fighting. If the defendant meets these requirements, then he had a right to self defense. [¶] … However, if the defendant used only nondeadly force[,] and the opponent responded with such sudden and deadly force … that the defendant could not withdraw from the fight, then the defendant had the right to defend himself [with] deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. The agreement may be expressed and stated or implied and must occur before the claim to self defense arose."

Defendant's trial counsel did not object to these instructions. The jury was also instructed pursuant to CALCRIM No. 200:

> "Some of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

During rebuttal argument, the prosecutor discussed CALCRIM No. 3471:

> "[T]he self defense case just does not make sense. [¶] And if you actually look at the jury instructions for self defense—if you're engaged in mutual combat, CALCRIM [No.] 3471 says a person who engages in mutual combat or who starts a fight has a right to self defense only if he

> actually and in good faith tried to stop fighting. And any evidence of that, the only time he stopped fighting was to take out his gun and start shooting. Number two, he indicated by word or by conduct [to] his opponent in a way that a reasonable person would understand that he wanted to stop fighting that he had stopped and that he had stopped fighting, and any evidence of that, absolutely none. [¶] Element No. 3, he gave his opponent a chance to stop fighting. He's engaged in mutual combat. According to this instruction, he is not entitled to self defense. Not only is it ridiculous for it to be self defense when people are running away from you, and it just doesn't follow under the law."

B. Applicable Law

"'[A]s used in this state's law of self-defense, "mutual combat" means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*.… In other words, it is not merely the *combat*, but the *preexisting intention to engage in it*, that must be mutual.'" (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1044, quoting *People v. Ross* (2007) 155 Cal.App.4th 1033, 1045 (*Ross*).) The agreement to fight may be expressed or implied. (*Ross*, *supra*, at pp. 1046–1047.) It "need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Id.* at p. 1047.)

C. Analysis

Neither defendant nor the People argue that CALCRIM No. 3471 is not a correct statement of the law. Rather, defendant contends the trial court deprived him of his due process rights and right to a trial by jury by including the mutual combat instruction because there was "no mutual intention, consent, or agreement preceding the initiation of hostilities." He argues the "instructional error ha[d] constitutional dimensions because the effect of the error deprived [him] of his right to have the jury determine whether the prosecution had proven, beyond a reasonable doubt, that the homicides and attempted

homicides were not excusable or partially excusable because of self-defense, defense of another, or imperfect self-defense."[2] The People respond "[a] reasonable jury could infer that the two competing groups had implicitly agreed to settle their preexisting differences by engaging in a fistfight." They further contend any error in giving CALCRIM No. 3471 was harmless because it was merely a "'"'"technical error.'"'"'[3]

Even assuming, arguendo, the trial court erred in including CALCRIM No. 3471, we agree with the People that any error was harmless. The California Supreme Court has noted "[g]iving an instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally '"only a technical error which does not constitute ground for reversal."'" (*People v. Cross* (2008) 45 Cal.4th 58, 67; accord, *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247; *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1335 (*Eulian*).) Contrary to defendant's assertion, error of the type alleged here, that is, giving a jury instruction which, while correctly stating the law, has no application to the case, "does not appear to be of federal constitutional dimension." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "The error is therefore one of state law subject to the traditional *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836) applicable to such error. [Citation.] Under *Watson,* reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton*, *supra*, at p. 1130.)

Here, even if we assume the trial court erred in including CALCRIM No. 3471 in its instructions, we cannot conclude it is reasonably probable a result more favorable to

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2 In addition to self-defense, here, the jury was instructed on imperfect self-defense as well as heat of passion and second degree murder.

3 Though there is no evidence defendant objected to the challenged instruction, the People do not argue he forfeited his claim of instructional error. Thus, we too proceed to the merits of this claim.

defendant would have been reached absent its inclusion. Defendant relies upon *Ross, supra*, 155 Cal.App.4th 1033 and *People v. Rogers* (1958) 164 Cal.App.2d 555 (*Rogers*) to argue the inclusion of CALCRIM No. 3471 prejudiced him by eliminating his claim of self-defense. However, the facts of these cases are inapposite.

In *Ross*, the appellate court explained mutual combat requires evidence that the combatants consented or intended to fight *before* the claimed occasion for self-defense arose. (*Ross, supra*, 155 Cal.App.4th at pp. 1046–1047.) The *Ross* court found reversible error where the jury was *not* properly instructed on the meaning of mutual combat and the trial court declined the jury's request for further guidance on its meaning. (*Id.* at pp. 1047, 1054–1056.)

In the 1958 *Rogers* case, another appellate court found prejudicial error where the jury was given an inapplicable instruction: "one 'who has sought or induced the quarrel' cannot assert self-defense unless he 'decline[d] further combat, honestly endeavor[ed] to desist therefrom, and fairly and clearly inform[ed] his adversary … of his desire for peace, and that he ha[d] abandoned the contest.'" (*Rogers, supra*, 164 Cal.App.2d at p. 557.) The trial court in *Rogers* also instructed the jury: "'[t]he right of self-defense is not available to either of two persons who by prearrangement, or otherwise by agreement, enter into and carry on a duel or deadly mutual combat,' unless the one claiming self-defense shows that he endeavored to decline further combat and [so informed] his adversary …." (*Id.* at pp. 557–558.) The *Rogers* court found the instructions unsupported by the evidence and concluded the defendant was prejudiced because the instructions denied him his principal defense of self-defense or defense of another threatened with great bodily harm. (*Id*. at p. 558.) It held because there was no evidence that the defendant attempted to withdraw from the melee or notified his opponents of his desire to do so, it was unlikely the jury ever reached the issue of self-defense. (*Ibid*.)

Here, unlike in *Ross* and *Rogers*, the trial court provided the jury with guidance on the definition of "mutual combat" and informed the jury that the agreement to mutual

combat "must occur before the claim of self defense arose." The trial court also informed the jury that some instructions may not apply, and the jury is presumed to have understood and followed the instructions it was given and disregarded the mutual combat instruction if the evidence did not support it. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422; *People v. Pearson*, *supra*, 56 Cal.4th at p. 414.) And though the prosecutor referred to the challenged instruction during her rebuttal argument, here, the jury convicted defendant of first degree murder. In so doing, the jury necessarily found that the killing was not only intended, but also premeditated and deliberate. On the facts presented here, the jury's finding of premeditation and deliberation is inconsistent with defendant's claim that he acted in self-defense.[4] Thus, we cannot conclude the prosecutor's brief discussion prejudiced defendant. (See *People v. Crandell* (1988) 46 Cal.3d 833, 874 ["In concluding that no prejudice resulted from any of the claimed errors related to instructions on self-defense, we have considered, in addition to the specific factors previously mentioned, that the jury convicted [the] defendant of the murder of [both victims], and that both murders were found to have been committed with premeditation and deliberation. These verdicts indicate a complete rejection of the evidence on which [the] defendant relied to establish self-defense."], overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.)

Accordingly, we agree with the People that the alleged error, if any, in this case—instructing the jury on mutual combat when the instruction was not supported by substantial evidence—was a technical one. Defendant has not met his burden of demonstrating "a reasonable likelihood that the jury understood the instruction in the way" he asserts (*People v. Cross*, *supra*, 45 Cal.4th at pp. 68–69; accord, *People v. Nelson* (2016) 1 Cal.5th 513, 545; see *Ross*, *supra*, 155 Cal.App.4th at pp. 1055–1056),

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[4] Notably, in *Rogers*, the defendant was convicted of second degree, as opposed to deliberate and premeditated murder.

and we reject his claim of error resulting in prejudice. (See *Ross*, *supra*, at p. 1056 [had jury been properly instructed on mutual combat on the present facts, they would have presumably ignored the instruction]; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381–1382 [inclusion of correct but irrelevant self-defense instruction was harmless error].)

We reject defendant's second contention.

III. CALCRIM No. 3472

Defendant next challenges the inclusion of CALCRIM No. 3472 in the jury instructions.

A. Relevant Factual Background

The trial court instructed the jury pursuant to CALCRIM No. 3472 (Right to Self-Defense: May Not Be Contrived): "A person does not have the right to self defense if he or she provoke[s a] fight or quarrel with the intent to create an [excuse] to use force." Defense counsel did not object to the inclusion of this instruction.

During rebuttal, the prosecutor argued:

> "CALCRIM [No.] 3472, right to self defense may not be contrived. This means he can't provoke a fight as an excuse to use force. He entered into that second fight. He entered into that group of people for whatever reason and he engaged in a fight. You can't get in a fight and then start shooting people."

Defense counsel also did not object to this rebuttal argument.

B. Analysis

Defendant argues "there was no evidence that at the time of the shooting, he had initiated or provoked a fight or quarrel with the intent to prompt anyone to react giving him an excuse of self-defense." Thus, he contends, the inclusion of CALCRIM No. 3472 deprived him of his rights to due process and a fair trial. The People argue there was evidence defendant provoked the fight, thus, justifying the instruction. They further contend even if the instruction was given in error, a result more favorable to defendant

was not reasonably probable. We agree with the People that any alleged error was harmless. [5]

The parties again do not argue CALCRIM No. 3472 is an incorrect statement of the law. Thus, as we have already noted, even if it was error to include it, it was "'"only a technical error which does not constitute ground for reversal."'" (*People v. Cross*, *supra*, 45 Cal.4th at p. 67.) And, to the extent such an instruction was not applicable to the facts of the case, we presume the jury followed the instruction to disregard it. Thus, we cannot conclude the inclusion of CALCRIM No. 3472 constituted reversible error. (See *Eulian*, *supra*, 247 Cal.App.4th at p. 1335 [If CALCRIM No. 3472 was erroneously given because it was irrelevant under the facts, error was merely technical and not grounds for reversal]; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 [jury was presumed to disregard CALCRIM No. 3472 if the jury found evidence did not support its application so its erroneous inclusion did not result in reversible error]; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1381 [rejecting argument erroneous instruction on contrived self-defense kept jury from evaluating the defendant's self-defense claim, concluding any error was harmless where jury was instructed to disregard inapplicable instructions].)

We reject defendant's third contention.[6]

IV. Cumulative Error

"Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to [the] defendant absent a combination of errors. (See *People v. Williams* (2009) 170

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[5] Again, there is no evidence defendant objected to the challenged instruction, but the People do not argue he forfeited his claim of instructional error. Thus, we proceed to the merits of this claim.

[6] In his fourth issue, defendant argues to the extent his challenges to CALCRIM Nos. 3471 and 3472 are waived because his counsel failed to object, he received ineffective assistance of counsel. Because we (and the People) reject these claims on their merits, finding no prejudicial error, we need not reach defendant's ineffective assistance of counsel claim.

Cal.App.4th 587, 646; *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ['Under the "cumulative error" doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial.'].) 'The "litmus test" for cumulative error "is whether [the] defendant received due process and a fair trial."' (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)" (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216–1217.)

Here, there is no series of prejudicial errors to cumulate. Accordingly, defendant cannot demonstrate the cumulative effect of the alleged errors resulted in prejudice. (See *In re Reno* (2012) 55 Cal.4th 428, 483 ["As noted, claims previously rejected on their substantive merits—i.e., this court found no legal error—cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate."].)

We reject defendant's fourth contention.

V. Remand in Light of Senate Bill No. 620

Senate Bill No. 620, signed into law on October 11, 2017, amended sections 12022.5 and 12022.53 to provide the trial court with discretion to dismiss, in furtherance of justice, firearm enhancements pursuant to sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The new law took effect on January 1, 2018. The law is applicable to those parties, like defendant, whose appeals were not final on the law's effective date.

Here, defendant seeks remand for a new sentencing hearing to permit the court to exercise its discretion regarding whether to strike the firearm enhancements in light of Senate Bill No. 620. The People concede Senate Bill No. 620 applies retroactively, but contend remand is not appropriate because the record shows the court would not have exercised its discretion to lessen the sentence. They argue the court's decision to impose consecutive sentences for counts 1–3 and 5, "the upper term for counts [4] and [6]," and

"the upper term for the accompanying section 12022.5 enhancements" establish it is not reasonably probable the trial court would exercise its new discretion to strike the firearm enhancements. The People further contend "the premeditated nature" of the murders and attempted murders further support a conclusion it is not reasonably probable the court would exercise its discretion to strike the firearm enhancements.

The Supreme Court has held: "'A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, … the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

The People cite *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 in support of their position remand is unnecessary here. However, *Gutierrez* is distinguishable because, there, the trial court indicated that it would not have exercised its discretion to lessen the sentence, clearly stating on the record it did not find "'any good cause to strike'" an enhancement for the prior conviction at issue and "'a lot of reasons not to,'" concluding that the appellant was "'the kind of individual the law was intended to keep off the street as long as possible.'" (*Id*. at p. 1896.) Unlike in *Gutierrez*, here, the trial court sentenced appellant to additional, consecutive 25-year-to-life terms based on the gun use enhancements without further comment. The record before us does not reflect the trial court knew it had discretion to strike defendant's firearm enhancements; nor does it reflect a clear indication by the trial court that it would not have struck these enhancements if it had discretion to do so.

The People also rely on *People v. Almanza* (2018) 21 Cal.App.5th 1308 (*Almanza I*), in which the appellate court initially declined to remand the case to allow

the trial court to exercise its discretion under Senate Bill No. 620. (*Almanza I*, *supra*, at p. 1314.) Instead, it held there was no reasonable probability the trial court would decline to apply the enhancements given that the "jury convicted Almanza of a cold-blooded, premeditated murder committed for the benefit of a criminal street gang," he had "two prior strikes and a prior prison term," and "[i]f the trial court were inclined to be lenient, it would have made the sentence for assault concurrent with the sentence for murder." (*Ibid*.) But the *Almanza* court amended its opinion on rehearing, concluding it applied the wrong standard of review in considering whether remand was appropriate. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111 (*Almanza II*).) Citing the standard articulated in *People v. Gutierrez*, *supra*, 48 Cal.4th 1894, the *Almanza II* court held on rehearing: "[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*Almanza II*, *supra*, at p. 1110.) Accordingly, in its revised opinion, the *Almanza II* court ordered the case be remanded, noting "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence … when there is a retroactive change in the law subsequent to the date of the original sentence that allows the trial court to exercise discretion it did not have at the time of sentence." (*Id*. at pp. 1110–1111.) Accordingly, *Almanza* supports a conclusion remand is proper on the record before us.

Thus, while we offer no position on how the trial court should act when exercising its newfound discretion under Senate Bill No. 620, we conclude the trial court should be provided the opportunity to exercise that discretion.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill No. 620, and, if appropriate following exercise of that discretion, to resentence defendant accordingly.

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MEEHAN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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SMITH, J.